Supreme Court, U.S.
FILED
JUN 9 1999
OFFICE OF THE CLERK

No. 98-9741

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

THOMAS KNIGHT,
N/K/A ASKARI ABDULLAH MUHAMMAD,

Petitioner,

-vs-

FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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THIS IS A CAPITAL CASE

QUESTIONS PRESENTED

1. Whether executing a prisoner nearly a generation after he was convicted and sentenced to die violates the prohibition against cruel and unusual punishments of the Eighth Amendment to the United States Constitution.

2. Whether imposition of the death penalty through the retrospective application of a statutory aggravating factor enacted after the commission of the crimes violates the prohibition against ex post facto punishments contained in Article I, section 10 of the United States Constitution.

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

Petitioner Thomas Knight, now known as Askari Abdullah Muhammad[1], prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida affirming the sentences of death in this case.

OPINION BELOW

The opinion of the Supreme Court of Florida is reported as Knight v. State, 721 So. 2d 287 (Fla. 1998), rehearing denied and revised opinion issued, 24 Fla. L. Weekly S135

[1]Petitioner's name was legally changed in 1982. In this petition he will be referred to as Mr. Muhammad, as he was in the federal court and in the state trial court on resentencing.

(Fla. March 11, 1999). The original opinion is reproduced in the Appendix to this petition as A-1 through A-16. The order denying rehearing is reproduced at A-17. The revised opinion is reproduced at A-18 through A-38.

JURISDICTION

The judgment of the Florida Supreme Court was entered on November 12, 1998. A petition for rehearing was timely filed and was denied on March 11, 1999. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(a), the petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS AT ISSUE

1. This case involves the Eighth Amendment to the United States Constitution, which forbids the infliction of "cruel and unusual punishments."

2. It also involves the Fourteenth Amendment to the United States Constitution, which provides in pertinent part:

> [N]or shall any state deprive any person of life . . . without due process of law . . . .

3. This case also involves Article I, Section 10 of the United States Constitution, which provides in pertinent part:

> No state shall . . . pass any . . . ex post facto law . . . .

STATEMENT OF THE CASE

The petitioner was originally sentenced to death on April 21, 1975 for first-degree

murders committed in July 1974. His convictions and death sentences were affirmed by the Florida Supreme Court on automatic direct appeal, Knight v. State, 338 So. 2d 201 (Fla. 1976), and post-conviction relief was denied on state collateral review, Knight v. State, 394 So. 2d 997 (Fla. 1981); Muhammad v. State, 426 So. 2d 533 (Fla. 1982). He was successful, however, in his attempt to vindicate his federal constitutional rights on federal habeas review. In Knight v. Dugger, 863 F. 2d 705 (11th Cir. 1988) (rehearing denied on August 23, 1989; mandate issued thereafter), the Eleventh Circuit Court of Appeals agreed that the Florida courts had imposed the death sentence in violation of the United States Constitution. After a new sentencing proceeding, he was again sentenced to death, on February 20, 1996. The Florida Supreme Court affirmed on mandatory, direct appeal on November 12, 1998. Petitioner's motion for rehearing and the state's motion for clarification were denied, and a revised opinion issued, on March 11, 1999.

At resentencing, evidence was presented regarding Mr. Muhammad's background, the circumstances of the crimes, and his confinement on death row. His childhood was one of poverty, hunger, and brutal beatings. Much of it was spent in state custody. At age nine, after an arrest for theft, he was committed to Florida School for Boys, the youngest child ever sent to that institution, where the children were more typically fifteen or sixteen years old. At age fifteen he was sent to adult prison for three-and-a-half years on a conviction for burglary. At age nineteen he was committed to a state mental hospital. As summarized by the Florida Supreme Court:

Numerous witnesses testified on Knight's behalf. They presented testimony that Knight, the second oldest of nine children, came from a family with a history of mental illness and neurological problems. Knight's sisters Mary Ann, Doris, and Edna, as well as Deputy Patrick Duval, detailed the poverty, hunger, and brutal beatings Knight had sustained during his childhood in Fort Pierce. Knight's father was an alcoholic who had stopped providing for his family in 1960. Knight's father beat him often and with brutality. The Knight children often went without food or clothing. In June 1960, Knight's father raped Knight's sister Mary Ann. Knight, nine years old at the time, either witnessed his sister's rape and tried to stop it, or was told about it by Mary Ann immediately thereafter.

Knight was first arrested at age nine for theft. When he was arrested on the same charge several months later, he was committed to the Florida School for Boys, the youngest child ever sent there. He was continually in trouble thereafter, until at age fifteen he was sent to state prison on a burglary conviction. At age nineteen, he was committed to the Northeast State Hospital where he was diagnosed with drug and poison intoxication, excessive drinking, and paranoid personality.

A-21.

Before his release from the hospital, he was evaluated by Dr. Arthur Wells, who reported that there was a good chance the patient would become psychotic again, "perhaps being dangerous to others." (R. 356, T. 2738). Out-patient treatment was recommended, but was not likely to be available in the patient's community. Accordingly, the prognosis was "somewhat guarded." (R. 356; T. 2740).

After his release from the hospital, petitioner was convicted of attempted grand larceny and sentenced to two-and-a-half years in prison. While in prison, he was given the psychotropic drug Thorazine, as he had been at the hospital. (T. 2527-28). He was released

in 1972 and went to live with his sister in Miami.

On July 17, 1974, he abducted Sydney and Lillian Gans and forced them to drive to a bank in downtown Miami to get $50,000. While inside the bank, Mr. Gans reported the abduction, and FBI and local police were alerted. Mr. Gans returned to the car with the money. The car then drove to south Dade County, being kept under surveillance by numerous law enforcement officers. The car went behind a ridge which ran alongside a canal. Shortly thereafter, Mr. and Mrs. Gans were found shot to death. Each had been shot once through the neck, from the rear seat of the vehicle. Death had been instantaneous or nearly instantaneous. After a massive manhunt, petitioner was apprehended in a weeded area about 2,000 feet from the vehicle.

On April 21, 1975, the petitioner was convicted on two counts of first-degree murder and sentenced to death. He was placed on death row in Florida State Prison. The convictions and sentences were affirmed on direct appeal in 1976.

On October 12, 1980, while his clemency petition and post-conviction appeal were still pending, Mr. Muhammad fatally stabbed a prison guard, Officer Richard Burke. Earlier in the day Mr. Muhammad was told that because he had not shaved he could not receive a scheduled visit from his mother. Although he had been issued a pass which, for medical reasons, allowed him to clip his beard short instead of shaving, his pass had expired. That evening, while he was being escorted to the shower, he stabbed Officer Burke with a sharpened serving spoon. Another guard witnessed the attack, but was unable to intervene

in time. (T. 2318-19).

The lawyers appointed to represent Mr. Muhammad at his trial for the murder of Officer Burke "were concerned about his mental state from the start." Muhammad v. State, 494 So. 2d 969, 970 (Fla. 1986). They intended to present an insanity defense, and moved for a competency hearing, but Mr. Muhammad would not cooperate with doctors appointed to determine his competency. Id. at 971. Appointed counsel was allowed to withdraw, and the court granted Mr. Muhammad's motion to proceed pro se. Id. at 971-72. His defense at trial consisted solely of holding the state to its burden of proof. Id. at 972. He was convicted and sentenced to death. The conviction and death sentence were affirmed on direct appeal. His post-conviction appeal in that case is still pending.

After the Burke homicide, Mr. Muhammad was placed in a special isolation cell in the area of the prison (then known as Q Wing, and now called X Wing) where the electric chair is located. He remained in isolation for twelve years, from 1980 to 1992. Normally, death-row inmates are kept in single-man cells, equipped with a toilet, sink, and a small black-and-white television. They are able to communicate through the bars with other inmates on the same corridor, and are allowed two hours in the yard each week. (T. 2256, 2295, 3536). X Wing is different. The isolation there is total. There are no yard privileges and no television. (T. 2296, 3547). There is no view to a corridor. The cell is completely enclosed. (T. 3536).

Mr. Muhammad made repeated efforts, through the prison grievance system, to be

transferred from the complete isolation of X Wing back to normal death row. However, he continued to accumulate disciplinary reports, mostly having to do with his refusal to respond to the name Thomas Knight. He had converted to Islam and in 1982 his name was legally changed to Askari Abdullah Muhammad (T. 3533). The prison, however, would not recognize the change of name. (T. 2292-93). Eventually a compromise was reached under which, at master count, he would give his prison number, followed by his Islamic name. (T. 3534-35). He finally succeeded in being returned to normal death-row status in 1992. (T. 2296, 2314-15, 3536).

Meanwhile, in 1989, the Eleventh Circuit Court of Appeals reversed the death sentences imposed for the murders of Mr. and Mrs. Gans and remanded for resentencing. The public defender appointed to represent Mr. Muhammad withdrew because of a conflict of interest, and other counsel was appointed. Competency hearings were held in 1992 and 1994. There was interlocutory appellate litigation concerning the payment of defense expert witnesses. Continuances were granted to both the state and the defense, because of scheduling conflicts and other reasons. During this time, except when brought down to Miami for competency hearings, Mr. Muhammad remained on death row.

The resentencing hearing took place in January and February 1996. The jury recommended death by a vote of 9 to 3. On February 20, 1996, the judge sentenced Mr. Muhammad to death. An automatic direct appeal was taken to the Supreme Court of Florida.

On appeal, petitioner asserted that application of the statutory aggravating

circumstance that the capital offense had been cold, calculated and premeditated ("CCP") to the crimes he committed in 1974 violated the constitutional prohibition against ex post facto laws because the legislature did not enact that aggravator until 1979. The Florida Supreme Court rejected this claim, stating that "we have previously determined that application of the CCP aggravator in this situation is not an ex post facto violation. Combs v. State, 403 So. 2d 418 (Fla. 1981)." A-29.

Petitioner also claimed that to execute him after he had endured two decades on death row would constitute unconstitutionally cruel and unusual punishment. The Florida Supreme Court rejected this point on appeal, stating, at A-34:

> Finally, Knight claims that to execute him after he has already endured more than two decades on death row is unconstitutionally cruel and unusual punishment. He also argues that Florida has forfeited its right to execute Knight under binding norms of international law. Although Knight makes an interesting argument, we find it lacks merit. As the State points out, no federal or state courts have accepted Knight's argument that a prolonged stay on death row constitutes cruel and unusual punishment, especially where both parties bear responsibility for the long delay. *See, e.g., White v. Johnson*, 79 F.3d 432 (5th Cir. 1996); *State v. Smith*, 931 P.2d 1272 (Mont. 1996). We also note that the Arizona Supreme Court recently rejected this precise claim. *See State v. Schackart*, 947 P.2d 315, 336 (Ariz. 1997) (finding "no evidence that Arizona has set up a scheme prolonging incarceration in order to torture inmates prior to their execution", *cert. denied*, No. 97-9613 (U.S. Oct. 5, 1998). Second, we also consider that irrespective of the status of this case, Knight has been and will remain incarcerated on death row for his 1980 murder of Officer Burke until that case is finalized. We similarly reject Knight's claim under international law.

WHY THE WRIT SHOULD BE GRANTED

I.

EXECUTING THE PETITIONER NEARLY A GENERATION AFTER HE WAS ORIGINALLY CONVICTED AND SENTENCED TO DEATH WOULD VIOLATE THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. Introduction and Summary.

Mr. Muhammad was convicted of first-degree murder and sentenced to death on April 21, 1975. Fourteen-and-a-half years later, the federal circuit court of appeals held that the death sentence had been imposed in violation of the United States Constitution. Knight v. Dugger, 863 F.2d 705 (11th Cir. 1988) (rehearing denied August 23, 1989; mandate issued thereafter). The state again sought the death penalty, and obtained it in February 1996. Automatic, mandatory appellate review followed.[2] The Florida Supreme Court affirmed in November 1998, denying rehearing in March 1999.

Thus, it has been more than twenty-four years since Mr. Muhammad was convicted and placed on death row. If execution ever takes place, it will come nearly a generation after

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[2]Florida's death penalty statute provides for "automatic review" by the Florida Supreme Court, § 921.141(4), Fla. Stat. Because the statute establishes a duty to examine every case in which the death sentence is imposed, the Florida Supreme Court has denied death-sentenced prisoners' requests to dismiss their appeals. See Goode v. State, 365 So. 2d 381, 384 (Fla. 1978); Klokok v. State, 589 So. 2d 219, 221-22 (Fla. 1991); see also Hill v. State, 656 So. 2d 1271, 1272 (Fla. 1995) (denying prisoner's motion to proceed pro se on appeal).

entry of the judgment of conviction and original sentence of death. This extraordinarily long time between conviction and execution of sentence is the result of the state's failure to afford Mr. Muhammad a constitutional capital sentencing hearing back in April 1975, a failure which made necessary a new sentencing hearing and subsequent automatic appeal. The delay must therefore be attributed to the state.

To execute Mr. Muhammad after this extraordinary delay would constitute cruel and unusual punishment in violation of the Eighth Amendment. Execution after such an extended period of time does not serve the constitutionally-permissible purposes of capital punishment, it is contrary to the intent of the Framers, and it would have been considered cruel and unusual at common law. See Lackey v. Texas, 115 S.Ct. 1421 (1995) (memoradum of Justice Stevens respecting the denial of certioari); Elledge v. Florida, 119 S.Ct. 366 (1998) (Breyer, J., dissenting). Moreover, to execute someone after holding him for more than two decades in the agonizing suspense and close confinement reserved for those who are about to die is an inhuman, degrading punishment, and a denial of the fundamental human dignity that the Eighth Amendment is intended to safeguard. Where, as here, the delay is the result of the state's initial failure to give the defendant the constitutional hearing to which he was entitled, it cannot be considered incidental to the processing of appeals. It is unnecessary and thus unconstitutional.

Despite the hope expressed by Justice Stevens several years ago, Lackey, 115 S.Ct. at 1421, the lower federal courts have not served as "laboratories" to further study this issue,

and instead have foreclosed relief on procedural grounds. This case presents no procedural obstacles to ruling on the merits: The claim was clearly raised in the trial court and on direct appeal, and is here on petition for writ of certiorari after direct appeal. The issue remains substantial and important, and should be resolved.

B. Execution After Long Delay Does Not Serve the Constitutionally-Permissible Purposes of Capital Punishment and Is Contrary to the Intent of the Framers.

This Court's decision in Gregg v. Georgia, 428 U.S. 153 (1976), holding that a sentence of death for the crime of murder is not a per se violation of the Eighth and Fourteenth Amendments, was based largely on the grounds that the death penalty was considered permissible by the Framers, and might serve the purposes of retribution and deterrence. Id. at 177, 183; Lackey, 115 S.Ct. at 1421. Neither ground justifies the execution of a person originally convicted and condemned to die over two decades ago.

Execution of the death penalty when it no longer realistically furthers the legitimate penological purposes it is deemed to serve, would be a "pointless and needless extinction of life" and, therefore, "patently excessive and cruel and unusual punishment violative of the Eighth Amendment." Furman v. Georgia, 408 U.S. 238, 312 (1972) (White, J., concurring). As Justice White reasoned in Furman:

> The imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve. At the moment that it ceases realistically to further these purposes, however, the emerging question is

> whether its imposition in such circumstances would violate the Eighth Amendment. It is my view that it would, for its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.

408 U.S. at 312-13. See also Gregg, 428 U.S. at 183 (joint opinion of Stewart, Powell, & Stevens, JJ.) ("[T]he sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering"); Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality) (under Gregg, a punishment is excessive and unconstitutional if it "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering").

This Court has recognized that the two constitutionally legitimate purposes justifying capital punishment are retribution and deterrence. Gregg, 428 U.S. at 183. Both of those purposes have already been satisfied by the twenty-four years Mr. Muhammad has been held in close confinement, alternating between hope and despair at the prospect of his eventual execution; and neither of those purposes would be measurably served by the additional step of executing him nearly a generation after his conviction. Execution after a delay of this magnitude would be a pointless and needless extinction of life which would not serve the constitutionally-legitimate purposes of capital punishment, and accordingly would constitute a patently excessive and cruel and unusual punishment violative of the Eighth Amendment. See Lackey, 115 S.Ct. at 1421-22 (execution after 17-year delay would arguably violate

Eighth Amendment because purposes of retribution and deterrence would arguably not be served); Elledge, 119 S.Ct. at (Breyer, J., dissenting) ("After such a delay, an execution may well cease to serve the legitimate penological purposes that otherwise provide a necessary constitutional justification for the death penalty.").

The additional deterrent effect of executing Mr. Muhammad now, or at any time in the future, compared to a sentence of twenty-four years on death row followed by continued incarceration for life, would be minimal at best. See Lackey, 115 S.Ct. at 1421-22 ("[T]he additional deterrent effect from an actual execution now, on the one hand, as compared to 17 years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal."); Coleman v. Balkcom, 451 U.S. 949, 952 (1981) (Stevens, J., concurring in denial of certiorari) ("The deterrent value of any punishment is, of course, related to the promptness with which it is inflicted. . . . [T]he deterrent value of incarceration during that period of uncertainty [on death row] may well be comparable to the consequences of the ultimate step itself.").

The need to exact retribution has already been satisfied by the twenty-four years Mr. Muhammad has spent on death row. See Lackey, 115 S.Ct. at 1421 (Stevens, J.) (after 17 years on death row, "the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted").

Moreover, execution after such protracted delay would not serve the purpose of legitimate retribution. In Gregg, 428 U.S. at 183, this Court explained that retribution is a

constitutionally-permissible reason for applying the death penalty because the "expression of society's moral outrage at particularly offensive conduct" is an essential function "in an ordered society that asks its citizens to rely on legal processes rather than self help to vindicate their wrongs," quoting with approval the following observations of Justice Stewart:

> The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy -- of self-help, vigilante justice, and lynch law.

Furman, 408 U.S. at 308 (Stewart, J., concurring).

The need to avoid sowing the "seeds of anarchy," 408 U.S. at 308, cannot reasonably justify executing someone nearly a generation after he was convicted and sentenced to die. So belated an expression of outrage could not possibly serve to dissuade from the path of dissolution a society disposed to self-help, vigilante justice, and lynch law. See Coleman, 451 U.S. at 960 (Rehnquist, J., dissenting from denial of certiorari) ("[t]here can be little doubt that delay in the enforcement of capital punishment frustrates the purpose of retribution.").

At this point, execution would be nothing more than a gratuitous display of brutality, serving to exact, not retribution, but merely vengeance, in violation of the Eighth Amendment. See Ford v. Wainwright, 477 U.S. 399, 410 (1987) (Eighth Amendment

protects "the dignity of society itself from the barbarity of exacting mindless vengeance"); see also Blackstone's Commentaries on the Laws of England (1769), Book IV, Chapter 32, page 397 (a delayed execution "affects the minds of the spectators rather as a terrible sight, than as the necessary consequence of transgression").

The execution of a condemned prisoner after inordinate delay attributable to state actors not only fails to serve any constitutionally-permissible purpose of capital punishment, it is also contrary to the intent of the Framers. As Justice Stevens observed, it cannot be justified by reference to the practice of 1789, when such delays seldom, if ever, occurred. Lackey, 115 S.Ct. at 1421; see also Pratt & Morgan v. Attorney General for Jamaica, 2 AC 1, 4 All ER 769, 773, (Privy Council 1993) (en banc) ("The death penalty in the United Kingdom has always been carried out expeditiously after sentence, within a matter of weeks or in the event of an appeal even to the House of Lords within a matter of months. Delays in terms of years are unheard of.") (emphasis added); id., 4 All ER at 775 (noting the "common law practice that execution followed as swiftly as practical after sentence").

"There is no doubt" that Section 10 of the English Bill of Rights of 1689 "is the antecedent of the cruel-and-unusual punishment clause of our Eighth Amendment." Harmelin v. Michigan, 501 U.S. 957, 966 (1991) (opinion of Scalia, J.); Elledge, 119 S.Ct. at 366 (Breyer, J., dissenting from denial of certiorari).

And, as this Court has long held, the content of English criminal jurisprudence in the eighteenth century is directly relevant to determining what the framers of our constitution

and Bill of Rights intended in drafting the various provisions. See Ex parte Grossman, 267 U.S. 87, 108-9 (1925) ("The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted."); Kepner v. United States, 195 U.S. 100, 125-26 (1904) ("In ascertaining the meaning of the phrase taken from the Bill of Rights it must be construed with reference to the common law from which it was taken."); Ex parte Wells, 59 U.S. 307, 311 (1856) (the word "pardon" must be given "the same meaning as prevailed here and in England at the time it found a place in the Constitution").

There can also be no doubt that prolonged incarceration under sentence of death would have been considered cruel and unusual at English common law, and, had it occurred, would have been remedied by commutation of the sentence to imprisonment. See Pratt, 4 All ER at 774. In Pratt, the Privy Council surveyed the history of English common law regarding the subject of lengthy imprisonment before execution, and concluded that this practice was not condoned at common law, stating:

> It is difficult to envisage any circumstance in which in England a condemned man would have been kept in prison for years awaiting execution. But if such a situation had been brought to the attention of the court their Lordships do not doubt that the judges would have stayed the execution to enable the prerogative of mercy to be exercised and the sentence commuted to one of life imprisonment.

Pratt & Morgan, 4All ER at 774. See also Riley v. Attorney General of Jamaica, 1 AC 719, 734-35, 3 All ER 469, 480-81 (Privy Council 1983) (Lord Scarman, dissenting, joined by

Lord Brightman) (arguing that "execution after inordinate delay would have infringed the prohibition against cruel and unusual punishment to be found in Section 10 of the Bill of Rights of 1689," and concluding that "the jurisprudence of the civilised world, much of which is derived from common law principles and the prohibition against cruel and unusual punishments in the English Bill of Rights, has recognised and acknowledged that prolonged delay in executing a sentence of death can make the punishment when it comes inhuman and degrading").

C. Execution Nearly a Generation After the Prisoner's Original Conviction and Sentence of Death is Cruel, Degrading, and a Violation of the Human Dignity the Eighth Amendment is Intended to Safeguard.

Mr. Muhammad has been on death row for more than twenty-four years. When he was originally sentenced to death he was twenty-four years old. He is now forty eight. He has spent half of his entire life, and nearly all his adult life, in the close confinement reserved for those condemned to die. Death-row inmates in Florida are kept in small cells "two paces wide and three paces deep." David Von Drehle, Among the Lowest of the Dead (1995), 126. They are not given employment and are kept in their cells. They are allowed only two hours per week in the "yard." (T. 2256). For twelve years Mr. Muhammad was denied even this. He was held in a special isolation cell in what is now known as X Wing. There the cells are smaller and the isolation is total. (T. 2297). The prisoner can neither see nor hear anything outside his cell. There are no windows; the door is solid steel. There is no televison, nothing to read but the legal materials of the inmate's own case, no yard privileges, no air

conditioning and no breeze. (T. 2296, 3536, 3547); see Meg Laughlin, Locked Alone in X Wing, The Miami Herald, May 30, 1999, at 1L to 3L (describing conditions on X Wing). X Wing is where the electric chair is located, and Mr. Muhammad will be held there again for a month before his execution. Id. at 3L.[3]

During the time that Mr. Muhammad has been on death row, Florida has electrocuted forty-three persons at Florida State Prison. The threat of execution is very real, and can only become more so with each passing year. As Mr. Muhammad stated to the judge:

> For the last 22 years I have been on death row. Thirty-seven people have been executed while I have been on death row so I know it's no joke. It's no show. It's no game for me. This is serious. I know it's serious.

(T. 365). The focus on death is pervasive. The condemned know in detail the manner in which they will die. Execution procedure is a "staple" of conversation on Florida's death row. Von Drehle at 289 ("[T]he vision of their final moments is one they rehearse over and over in their minds. . . . They experience it again and again and again, in daydreams and nightmares, and they alter every variable, ponder every option."). To be kept for decades in such a state, with the mind focused on death, not knowing whether to hope or despair,

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[3]The purpose, according to the article, is to ensure a quiet execution:

> David Lehr, a former FSP assistant superintendant, . . . explained that Death Row inmates are put on X Wing a month before their scheduled execution to complete the process of breaking them down before they are strapped into the electric chair. "This way, they go quietly," he said.

Id.

neither adjusting to life nor preparing for death, is to be deprived of any human existence.

The Eighth Amendment "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity and decency'" against which forms of punishment must be measured. Estelle v. Gamble, 429 U.S. 97, 102 (1976) (citation omitted). It stands to safeguard "nothing less than the dignity of man," Trop v. Dulles, 356 U.S. 86, 100 (1958), and "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," id. at 101. As the concepts of dignity and civility evolve, so too do the limits of what is considered cruel and unusual. Such concepts of dignity and civility include international practices. See, e.g., Stanford v. Kentucky, 492 U.S. 361, 369 (1989); Coker v. Georgia, 433 U.S. 584 (1977); Enmund v. Florida, 458 U.S. 782 (1982).

To execute someone after keeping him isolated in a small cell for more than two decades, in conditions designed for those who are soon to die, with nothing to do but agonize about his fate, is not only cruel, it is degrading, inhuman, and a violation of the fundamental human dignity that the Eighth Amendment stands to protect. Such prolonged incarceration under the shadow of impending execution (which may or may not come) constitutes additional punishment, far beyond the "mere extinguishment of life" inherent in a death sentence, and is cruel both in a dictionary and a constitutional sense. See In re Kemmler, 136 U.S. 436, 447 (1890) ("Punishments are cruel when they involve . . . a lingering death . . . something more than the mere extinguishment of life.").

While close confinement and mental anguish at the prospect of a violent, humiliating

death may be inevitable concomitants of the death penalty, the prolongation of these conditions for decades is not. This is a new punishment, different in kind from the "short but awful" interval between sentence and execution experienced by the condemned prisoner in Blackstone's day. Blackstone's Commentaries, Book IV, Chapter 14, page 202. This Court recognized over a century ago that the pain and mental anxiety caused by near-solitary confinement and uncertainty as to when the execution will take place are constitutionally-significant additions to the punishment inflicted on a person condemned to death. See In re Medley, 134 U.S. 160 (1890) (setting free a state prisoner condemned to death because solitary confinement and a secret time of execution were additional punishments which violated the constitution's prohibition of ex post facto laws). This Court explained that solitary confinement in "a place where imprisonment always implies disgrace," 134 U.S. at 169, was "an additional punishment of the most important and painful character," id. at 171, and that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it, which may exist for the period of four weeks, as to the precise time when his execution shall take place." Id. at 172. The prisoner's uncertainty as to the time execution "must be accompanied by an immense mental anxiety amounting to a great increase of the offender's punishment." Id. at 172.

As Justice Stevens observed in Lackey, if the Court accurately described the effect of uncertainty in Medley, which involved a period of four weeks, "that description should

apply with even greater force in the case of delays that last for many years." Lackey, 115 S.Ct. at 1421. The inherent torturousness and cruelty of a prolonged stay on death row has been recognized by numerous jurists and legal commentators. E.g., Coleman, 451 U.S. at 952 (Stevens, J., concurring in denial of certiorari) (the mental pain suffered by a condemned prisoner awaiting execution is "a significant form of punishment" that "may well be comparable to the consequences of the ultimate step itself"); Sullivan v. Wainwright, 464 U.S. 109, 112 (1983) (Burger, C.J., concurring) ("The argument so often advanced by the dissenters that capital punishment is cruel and unusual is dwarfed by the cruelty of 10 years on death row inflicted upon this guilty defendant by his lawyers seeking to turn the administration of justice into the sporting contest that Roscoe Pound denounced three-quarters of a century ago."); Furman, 408 U.S. at 288-89 (Brennan, J., concurring) ("[W]e know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution extracts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death"); People v. Anderson, 493 P.2d 880 (Cal. 1972) ("The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to the execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the [protracted] process of carrying out a verdict of death is often so degrading and

brutalizing to the human spirit as to constitute psychological torture.").[4]

Medley involved the prohibition of ex post facto laws, rather than the Eighth Amendment, which at that time did not apply to the states. However, since Medley was decided, the cruel and unusual punishments clause of the Eighth Amendment has been held applicable to the states, Robinson v. California, 370 U.S. 660 (1962), and it has been recognized that the infliction of extreme mental anguish can be a form of unconstitutional torture, see, e.g., Trop v. Dulles, 356 U.S. at 102 (expatriation as penalty for desertion "subjects the individual to a fate of ever increasing fear and distress"); Hudson v. McMillan, 503 U.S. 1, 16 (1992) (Blackmun, J., concurring) ("I am unaware of any precedent of this Court to the effect that psychological pain is not cognizable for constitutional purposes [under the Eighth Amendment]. If anything, our precedent is to the contrary."); Furman, 408 U.S. at 271-72 (Brennan, J., concurring) ("[T]he Framers also knew 'that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation.'"), quoting Weems v. United States, 217 U.S. 349,372 (1910).

Evolving concepts of civility and dignity, including international practices, require the conclusion that execution after two decades on death row is cruel and unusual

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[4]See also Suffolk County District Attorney v. Watson, 411 N.E.2d 1274, 1289-95 (Mass. 1980) (Liacos, J., concurring) (describing the psychological pain and torture that the condemned person experiences while awaiting execution); id. at 1287 (Braucher, J., concurring) (arguing that capital punishment is unconstitutional under Massachusetts Constitution in part because "it will be carried out only after agonizing months and years of uncertainty").

punishment violative of the Eighth Amendment. As Lords Scarman and Brightman observed sixteen years ago, "[i]t is no exaggeration . . . to say that the jurisprudence of the civilised world, much of which is derived from common law principles and the prohibition against cruel and unusual punishments in the English Bill of Rights, has recognised and acknowledged that prolonged delay in executing a sentence of death can make the punishment when it comes inhuman and degrading." Riley v. Attorney General of Jamaica, 1 AC 719, 3 All ER 469 (Privy Council 1983) (Lord Scarman, dissenting, joined by Lord Brightman). That statement is even truer today. See Pratt, 4 All ER at 784-87 (discussing cases and concluding that to execute a prisoner after holding him on death row for fourteen years constitutes "torture," and "inhuman" and "degrading" punishment, within the meaning of section 17(1) of Jamaica's constitution); Soering v. United Kingdom, 11 Eur. Hum. Rts. Rep. 439 (1989) (European Court of Human Rights refused to extradite a German national from the UK to Virginia to face capital murder charges because anticipated time that he would have to spend on death row if sentenced to death would constitute torture or inhuman or degrading treatment or punishment within the meaning of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms); Catholic Comm'n for Justice & Peace in Zimbabwe v. Attorney General, No. S.C. 73/93 (Zimbabwe, 1993) (reported in 14 Hum.Rts.L.J. 323 (1993) (vacating death sentences because execution after inordinate delay would contravene constitutional provision that "[no] person shall be subjected to torture or to inhuman or degrading punishment or other such treatment").

These decisions do not rest simply on the suffering inflicted by prolonged incarceration awaiting execution. No one argues that execution must take place immediately after sentencing; it is generally recognized that there must be a reasonable time for appeal. At some point, however, there must be a resolution, and "[i]n the last resort the courts have to accept the responsibility of saying whether the threshold has been passed in any given case," rendering further incarceration under sentence of death, or execution, no longer acceptable. Pratt, 4 All ER at 787.

In 1993, the Privy Council of the United Kingdom held, in a unanimous, en banc decision, that to execute a prisoner after holding him on Jamaica's death row for fourteen years constitutes "torture," and "inhuman" and "degrading" punishment, within the meaning of section 17(1) of Jamaica's constitution. Although it had no difficulty concluding that the men had suffered great anguish of mind, or that execution after holding them in an agony of suspense for so many years would be an inhuman act,[5] the Privy Council also recognized

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[5]The prisoners had been on death row for fourteen years, and on three occasions death warrants had been read to them and they had been removed "to the condemned cells immediately adjacent to the gallows." The Privy Council observed:

> The statement of these bare facts is sufficient to bring home to the mind of any person of normal sensitivity and compassion the agony of mind that these men must have suffered as they have alternated between hope and despair in the 14 years that they have been in prison facing the gallows. It is unnecessary to refer to the evidence describing the restrictive conditions of imprisonment and the emotional and psychological impact of this experience, for it only reveals that which is to be expected.

that there must be a "reasonable" time for appeal, and that delay "due entirely to the fault of the accused such as an escape from custody or frivolous and time wasting resort to legal procedures which amount to an abuse of process" should not preclude execution, since the accused cannot be permitted to use "illegitimate means to escape the punishment inflicted upon him in the interest of protecting society against crime," Pratt, 4 All ER at 784. The difficult question was:

> whether the delay occasioned by the legitimate resort of the accused to all available appellate procedures should be taken into account, or whether it is only delay that can be attributed to the shortcomings of the state that should be taken into account.

Id.

To decide this question, the Privy Council reviewed its own past decisions, as well as decisions of other nations, and of the European Court of Human Rights. In particular, it considered the view, which it believed prevailed in some states of the United States, that "it cannot be inhuman or degrading to allow an accused every opportunity to prolong his life by resort to appellate procedures however extended may be the eventual time between

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4 All ER at 772. It further observed that,

> There is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity: we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time.

4 All ER at 784.

sentence and execution." Pratt, 4 All ER at 784. It concluded that execution must follow "as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve" and that a delay of almost fourteen years was "wholly unacceptable." Id. at 787. As stated by the Privy Council:

> To execute these men now after holding them in custody in an agony of suspense for so many years would be inhuman punishment within the meaning of s 17(1) [of Jamaica's Constitution]. In the last resort the courts have to accept the responsibility of saying whether the threshold has been passed in any given case and there may be difficult borderline decisions to be made. This, however, is not a borderline case. The [14-year] delay in this case is wholly unacceptable and this appeal must be allowed.

Pratt, 4 All ER at 787.

In the United States, the issue remains a substantial, unresolved question, as Justices Stevens and Breyer pointed out in Lackey four years ago. In Lackey, Justice Stevens observed that the question of whether executing a prisoner after prolonged incarceration on death row violates the Eighth Amendment was novel, important, and "not without foundation," 115 S.Ct. at 1421, but concluded that in view of the claim's "legal complexity and potential for far-reaching consequences," it should receive further study in the "laboratories" of the state and federal courts. Id. at 1422.

Contrary to the hope of Justice Stevens the lower federal courts have not served as a laboratory to further study this issue. Over the strenuous dissents of several judges, the federal courts have generally refused to consider the question on its merits, foreclosing relief

on procedural grounds, such as abuse of the writ or on the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). E.g., White v. Johnson, 79 F.3d 432 (5th Cir. 1996); Stafford v. Ward, 59 F.3d 1025, 1028 (10th Cir. 1995); Turner v. Jabe, 58 F.3d 924, 926 (4th Cir. 1995); Porter v. Singletary, 49 F. 3d 1483, 1485 (11th Cir. 1995); McKenzie v. Day, 57 F.3d 1461, 1463 (9th Cir. 1995), superseded en banc as McKenzie v. Day, 57 F. 3d 1493 (9th Cir. 1995); Ceja v. Stewart, 134 F.3d 1368 (9th Cir. 1998).

The state courts have generally taken the position, as the Florida Supreme Court did here, that, given the absence of a federal decision to the contrary, execution after prolonged incarceration under sentence of death cannot be unconstitutional, so long as the delay is due to appellate procedures, rather than a deliberate scheme to torture inmates. State v. Schackart, 947 P.2d 315 (Ariz. 1997); State v. Smith, 931 P.2d 1272 (Mont. 1996); Bell v. State, 938 S.W.2d 35 (Tex. Crim. App. 1996); Hill v. State, 962 S.W.2d 762 (Ark. 1998); Stafford v. State, 899 P.2d 657 (Okla. 1995); Bush v. State, 695 So. 2d 138 (Ala. 1997). The federal dicta upon which these decisions rely reflects a misunderstanding of the claim. See McKenzie, 57 F.3d at 1484-89 (Norris, J., dissenting); Ceja, 134 F.3d at 1369-78 (Fletcher, J., dissenting). Smith, 931 P.2d at 1291-92 (Leaphart, J., specially concurring). In particular, the suggestion that a death row inmate cannot complain of any delay unless he foregoes the opportunity to question the constitutionality of his conviction and death sentence, and insists on quick execution, "gives new meaning to the notion of 'mockery of justice.'" McKenzie, 57 F. 3d at 1489 (Norris, J., dissenting).

Where, as here, the inherent cruelty of living under a sentence of death is prolonged for more than two decades, because of the state's initial failure to give the prisoner the constitutional sentencing hearing to which he was entitled, such suffering cannot be considered incidental to the processing of the appeals. It is unnecessary and thus unconstitutional. See Elledge, 119 S.Ct. at 366-67 (Stevens, J., dissenting from denial of certiorari) (execution after delay of nearly a generation because of the state's own faulty procedures may be particularly cruel); Smith, 931 P.2d at 1291 (Leaphart, J., specially concurring) (when a defendant is successful in his appeals, serious questions are raised "as to how long a defendant can be expected to languish on death row while the State and the trial courts are afforded repeated opportunities to comply with due process"). Such long-term suffering becomes a separate form of punishment, which is equivalent to or greater than an actual execution. See Coleman, 451 U.S. at 952 (Stevens, J., concurring in denial of certiorari). As a result of the inordinate delay, death cannot be added to the punishment; the only permissible punishment under the Eighth Amendment is life imprisonment.

This case presents no procedural obstacles to ruling on the merits. The claim was clearly raised in the trial court and on direct appeal, and is here on petition for writ of certiorari after direct appeal. This Court should grant the petition for writ of certiorari to decide this important, unresolved issue.

II.

IMPOSITION OF THE DEATH PENALTY THROUGH THE RETROSPECTIVE APPLICATION OF A STATUTORY AGGRAVATING FACTOR ENACTED AFTER THE COMMISSION OF THE CRIMES VIOLATED THE PROHIBITION AGAINST EX POST FACTO PUNISHMENTS OF ARTICLE I, § 10 OF THE UNITED STATES CONSTITUTION.

In February 1996, after a new sentencing hearing, Mr. Muhammad was sentenced to death for murders committed in July 1974. Among the statutory aggravating circumstances submitted to the jury, and relied upon by the judge in sentencing Mr. Muhammad to death, was the circumstance that "[t]he capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification," § 921.141(5)(i), Fla. Stat. (1995). This aggravating circumstance (referred to as "CCP") "encompasses something more than premeditated first-degree murder." Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994). The Florida Supreme Court has summarized its meaning as follows:

> [I]n order to find the CCP aggravating factor under our case law, the jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), * * *; *and* that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), * * *; *and* that the defendant exhibit heightened premeditation (premeditated), * * *; *and* that the defendant had no pretense of moral or legal justification. * * *

Jackson, 648 So. 2d at 89 (citations omitted) (original emphasis).

The CCP aggravator was added to Florida's death penalty statute in 1979, five years after the offenses for which Mr. Muhammad was sentenced to death. Chapter 79-353, Laws of Florida. In the trial court and on appeal, Mr. Muhammad asserted that its application to the crimes committed in 1974 was a violation of the constitutional prohibition of ex post facto laws. The Florida Supreme Court rejected this argument, based on its decision in Combs v. State, 403 So. 2d 418 (Fla. 1981), cert. denied, 465 U.S. 1052 (1984), where it held that in enacting CCP the legislature had not added an "entirely new" factor as an aggravating circumstance, but had only "reiterate[d] in part what is already present in the elements of premeditated murder," with "limitations which inure to the benefit of a defendant," Combs, 403 So. 2d at 421. The state supreme court's analysis is incompatible with the decisions of this Court interpreting the requirements of the Ex Post Facto Clause.

A change in sentencing law violates the Constitution's prohibition against ex post facto punishments "if it is both retrospective and more onerous than the law in effect on the date of the offense." Weaver v. Graham, 450 U.S. 24, 30 (1981). To fall within the ex post facto prohibition, a law must not only "apply to events occurring before its enactment," it "must disadvantage the offender affected by it," by altering the definition of criminal conduct or increasing the punishment for the crime. Lynce v. Mathis, 117 S. Ct. 891, 896 (1997), quoting Weaver, 450 U.S. at 29, and citing Collins v. Youngblood, 497 U.S. 37, 50 (1990); accord Miller v. Florida, 482 U.S. 423, 430 (1987). Moreover, no ex post facto violation occurs from changes which are procedural and do not affect matters of substance. Dobbert

v. Florida, 432 U.S. 282, 293 (1977). "Whether a retrospective state criminal statute ameliorates or worsens conditions imposed by its predecessor is a federal question." Weaver, 450 U.S. at 33. "The inquiry looks to the challenged provision, and not to any special circumstances that may mitigate its effect on the particular individual." Id.

"Weaver and Miller held that the Ex Post Facto Clause forbids the States to enhance the measure of punishment by altering the substantive 'formula' used to calculate the applicable sentencing range." California Dept. of Corrections v. Morales, 514 U.S. 499, 505 (1995). The statute at issue in Miller established "presumptive sentencing ranges" for various offenses, which judges were required to follow in the absence of clear and convincing reasons for a departure. The legislature enacted a revised guidelines law which, by increasing the number of points assigned to the crimes of conviction, effected an increase in the presumptive sentencing range. This Court unanimously held that retrospective application of the revised guidelines violated the Ex Post Facto Clause, because the change substantially disadvantaged those affected by it and was not procedural: The increase in points did not alter the method to be followed in determining the appropriate sentence, "it simply insert[ed] a larger number into the same equation," thereby increasing the "quantum of punishment" for that category of crimes. Id., 482 U.S. at 433-34.

Like the revision of the sentencing guidelines considered in Miller, the addition of the CCP aggravating circumstance to Florida's death penalty statute enhances the measure of punishment by altering the "substantive formula" used to determine the applicable sentence,

and, therefore its retrospective application to crimes committed before its enactment violates the prohibition against ex post facto punishments.

Florida's death penalty statute requires the jury to determine whether "sufficient aggravating circumstances exist," whether "sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist," and "[b]ased on these considerations, whether the defendant should be sentenced to life imprisonment or death." § 921.141(2), Fla. Stat. (1995); § 921.141(2), Fla. Stat. (1973). If a majority of the jury recommends death, the judge, too, must make these determinations. § 921.141(3), Fla. Stat. (1995); § 921.141(3), Fla. Stat. (1973).

The only aggravating circumstances which can be considered are those set forth in the statute. § 921.141(5), Fla. Stat. (1995) ("Aggravating circumstances shall be limited to the following . . ."); § 921.141(5), Fla. Stat. (1973) (same); Purdy v. State, 343 So. 2d 4, 6 (Fla. 1977) ("The specified statutory circumstances are exclusive; no others may be used for that purpose."); Miller v. State, 373 So. 2d 882, 885 (Fla. 1979) (same); Grossman v. State, 525 So. 2d 833, 842 (Fla. 1988) (same).

Moreover, the death penalty cannot be imposed unless at least one of the statutory aggravating circumstances is properly found. Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992) ("a defendant cannot be executed in the absence of aggravating factors"); Banda v. State, 536 So. 2d 221, 225 (Fla. 1988) ("The death penalty is not permissible under the law of Florida where, as here, no valid [statutory] aggravating factors exist."). Even if convicted

of first-degree, premeditated murder, a person is not eligible for the death penalty in the absence of a statutory aggravating circumstance. See Richardson, 604 So. 2d at 1109 (reducing death sentence to life imprisonment because, although there was sufficient evidence that the murder was calculated, it was not "cold," and thus CCP did not apply, and, since the other aggravator found by the judge also did not apply, the defendant could not be executed); Banda, 536 So. 2d at 225 (although cold and calculated, the murder was not CCP, which was the only aggravator found by the judge, and therefore the death sentence had to be replaced by a sentence of life in prison).

Thus, as the Florida Supreme Court has repeatedly held, the statutory aggravating circumstances, when read with the statutes defining capital crimes, "actually define those crimes . . . to which the death penalty is applicable." State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973); Combs, 403 So. 2d at 421.

Under such a capital sentencing statute, the enactment of a new aggravating circumstance necessarily alters the "substantive formula" used to determine the applicable sentence, and substantially disadvantages those affected by the change. The addition of an aggravating circumstance to the statutory list renders eligible for the death penalty persons who were not so before and, even in those cases where other aggravating circumstances apply, increases the risk that a death sentence will be recommended by the jury and imposed by the sentencing judge, since there is now an additional factor to be weighed against any mitigating circumstances. Such a change in the standard used to choose between life and

death is substantive and detrimental and therefore its retrospective application violates the prohibition against ex post facto laws. See Miller, 482 U.S. at 431-36 (change in presumptive guidelines sentencing range was not procedural, clearly disadvantaged those affected by it, and its retrospective application was an ex post facto violation); Bowen v. State, 911 S.W.2d 555, 563-64 (Ark. 1995) (concluding, based on Miller, that retrospective application of a statutory aggravating circumstance was an ex post facto violation, because, as standards guiding selection of the punishment, such statutory provisions are substantive, not merely procedural, and although adding an aggravator "does not guarantee the harsher sentence, it may have a direct effect on the decision and thus result in a harsher sentence than might have been imposed were that aggravating circumstance not present"); State v. Jordan, 440 So. 2d 716, 718 (La. 1983) (addition of aggravating circumstance was a substantive change in the law, and its application to defendant was an ex post facto violation because, assuming arguendo that other aggravators did not apply, he was now exposed to the death penalty whereas at the time of the murder he was not so exposed); State v. Correll, 715 P.2d 721, 734-35 (Ariz. 1986) (addition of aggravating circumstance, which was one of three found by the trial court, was a substantive, not a procedural, change, and since it "obviously" disadvantaged defendant was an ex post facto law); see also Trotter v. State, 690 So. 2d 1234, 1238 (Fla. 1997) (Anstead, J., dissenting) (redefining a death penalty crime by amending aggravating circumstance was obviously a "far more substantial change in the law" than the changes involved in Miller and Weaver).

The Supreme Court of Florida has recognized that the addition of statutory aggravators may constitute a substantive change in the law of capital punishment, and that retrospective application may be prohibited by the Ex Post Facto Clause. Hootman v. State, 709 So. 2d 1357, 1360 (Fla. 1998) (aggravating circumstance that "[t]he victim of the capital felony was particularly vulnerable due to advanced age or disability" could not be applied retrospectively because it was an "entirely new" aggravator, which changed the substantive law of capital punishment and disadvantaged the defendant "by altering the definition of the criminal conduct and increasing the punishment of a crime"), receded from on other grounds in State v. Matute, 713 So. 2d 1006 (Fla. 1998). However, only the addition of aggravators it deems to be "entirely" new is considered to effect a "substantial" change in the law whose retrospective application would violate the Ex Post Facto Clause. See Hootman, 709 So. 2d at 1360; Trotter, 690 So. 2d at 1237 (finding no ex post facto violation in retrospective application of amended aggravator, which in its unamended form had been held inapplicable in defendant's case, "just as we have found no violation in every other case where an aggravating circumstance was applied retroactively," because the extension of the aggravator's scope to encompass the circumstances of defendant's case was merely a "refinement" of the law, not a substantive change).

In Combs, the Florida Supreme Court held that application of the CCP aggravator to a crime which occurred before that aggravator was enacted did not violate the prohibition against ex post facto laws, explaining that the legislature had not added an "entirely new"

factor as an aggravating circumstance, but had only "reiterate[d] in part what is already present in the elements of premeditated murder," with "limitations which inure to the benefit of a defendant." Combs, 403 So. 2d at 421. As stated by the Florida Supreme Court:

> What, then, does paragraph (i) [establishing the CCP aggravator] add to the statute? In our view, it adds the requirement that in order to consider the elements of a premeditated murder as an aggravating circumstance, the premeditation must have been "cold, calculated and . . . without any pretense of moral or legal justification." Paragraph (i) in effect adds nothing new to the elements of the crimes for which petitioner stands convicted but rather adds limitations to those elements for use in aggravation, limitations which inure to the benefit of a defendant.

Combs, 403 So. 2d at 421.

This "peculiar position" is "simply untenable," Justus v. Florida, 465 U.S. 1052, 1054 (1984) (Marshall, joined by Brennan, JJ., dissenting from denial of certiorari), and cannot survive the analysis required by this Court's decision in Miller, see Ellis v. State, 622 So. 2d 991, 1002 (Fla. 1993) (Kogan, J., concurring) (Miller renders unconstitutional a retroactive application of the CCP aggravator).

The cold, calculated or premeditated aggravating circumstance is not merely a restatement of an element of the crime of first-degree murder, nor a reiteration of an existing aggravating circumstance. The elements of premeditated murder, unlike the statutory aggravating circumstances, did not give rise to a presumption that death is the proper sentence. See Dixon, 283 So. 2d at 9. And, before the addition of the CCP aggravator,

neither the judge nor the jury could consider in aggravation the fact that the murder was "the product of cool and calm reflection," or that it was carefully planned, or that the defendant exhibited "heightened premeditation" and had "no pretense of moral or legal justification," because those circumstances, which are included under CCP, Jackson, 648 So. 2d at 89, were not in the exclusive list of aggravating circumstances which the judge and the jury were required to weigh against whatever mitigation might be present. See Purdy, 343 So. 2d at 6 ("The specified statutory circumstances are exclusive; no others may be used for that purpose."); Miller, 373 So. 2d at 885 (same); Grossman, 525 So. 2d at 842 (same).

Enactment of the CCP aggravator did not place "limitations" on an existing aggravating circumstance, it expanded the circumstances in which the death penalty could be considered presumptively appropriate. It rendered eligible for the death penalty persons who were not so before, and increased the risk that others would be sentenced to death. Like the revision of the guidelines considered in Miller, such a change, whether or not it is "entirely" new, is substantive, not procedural, and cannot be considered ameliorative. See Bowen, 911 S.W. 2d at 563-64; Jordan, 440 So. 2d at 718; Correll, 715 P.2d at 734-35; Ellis, 622 So. 2d at 1002 (Kogan, J., concurring); Trotter, 690 So. 2d at 1238 (Anstead, J., dissenting); see also Combs, 403 So. 2d at 422 (Sundberg, C.J, concurring in part and dissenting in part, joined by England and McDonald, JJ.) ("I must confess that it is beyond my powers of comprehension to understand how the majority can seriously contend that the addition of subsection (i) as an aggravating circumstance "inure[s] to the benefit of a

defendant.").

By altering the substantive formula used to determine whether a death sentence should be imposed, this change increased the quantum of punishment. The legislature has not only "inserted a larger number into the same equation," see Miller, 482 U.S. at 433, it has changed the equation itself, see Justus, 465 U.S. at 1054 (Marshall, joined by Brennan, JJ., dissenting from denial of certiorari) ("By amending its death penalty statute [to add CCP], Florida changed the ground rules for judging the totality of the circumstances."). In the present case, application of this new aggravator, to which the sentencing judge gave "great weight" (R. 528), "made it easier for the Florida judge to sentence petitioner to death, and for that reason alone was more onerous for petitioner than the sentencing procedure in place at the date of his offense." Justus, 465 U.S. at 1054. The Florida Supreme Court's conclusion that no ex post facto violation occurred, and its analysis of the requirements of the Clause in this context, is clearly contrary to the decisions of this Court.

CONCLUSION

For the foregoing reasons, the writ should be granted.

Respectfully submitted,

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June 9, 1999

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